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No. 04-731

In the Supreme Court of the United States

EASTERN SHOSHONE TRIBE OF THE WIND RIVER RESERVATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Since 1990, each appropriations Act for the Department of the Interior has provided in substance that the statute of limitations "shall not commence to run on any claim, * * * concerning losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss." *E.g.*, Act of Nov. 10, 2003, Pub. L. No. 108-108, Tit. I, 117 Stat. 1263. The question presented is as follows:

Whether the relevant appropriations provisions postponing the running of the limitations period for claims concerning "trust funds" have the effect of preserving claims that allege mismanagement of a Tribe's natural resources, including a failure by the government to negotiate adequate prices for mineral leases.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Discussion	7
Conclusion	11

TABLE OF AUTHORITIES

Case:

United States v. *Navajo Nation*, 537 U.S. 488 (2003) 5

Statutes:

Act of Nov. 5, 1999, Pub. L. No. 101-512, Tit. I, 104 Stat. 1930 2

Act of Nov. 13, 1991, Pub. L. No. 102-154, Tit. I, 105 Stat. 1004 2

Act of Oct. 5, 1992, Pub. L. No. 102-381, Tit. I, 106 Stat. 1389 2

Act of Nov. 11, 1993, Pub. L. No. 103-138, Tit. I, 107 Stat. 1391 2

Act of Sept. 30, 1994, Pub. L. No. 103-332, Tit. I, 108 Stat. 2511 2

Act of Apr. 26, 1996, Pub. L. No. 104-134, Tit. I, 110 Stat. 1321-175 2

Act of Sept. 30, 1996, Pub. L. No. 104-208, Tit. I, 110 Stat. 3009-197 2

Act of Nov. 14, 1997, Pub. L. No. 105-83, Tit. I, 111 Stat. 1559 2

Act of Nov. 29, 1999, Pub. L. No. 106-113, App. C, Tit. I, 113 Stat. 1501A-153 2

Act of Oct. 11, 2000, Pub. L. No. 106-291, Tit. I, 114 Stat. 989 2

Act of Nov. 5, 2001, Pub. L. No. 107-63, Tit. I, 115 Stat. 435 2

Statutes—Continued: Page

Act of Feb. 20, 2003, Pub. L. No. 108-7, Div. F, Tit. I, 117 Stat. 236 2
Act of Nov. 10, 2003, Pub. L. No. 108-108, Tit. I, 117 Stat. 1263 ..... 2, 3
American Indian Trust Fund Management Reform Act of 1994, Pub. L. No. 103-412, 108 Stat. 4239 ..... 9, 10
Indian Mineral Leasing Act of 1938, ch. 198, 52 Stat. 347 (25 U.S.C. 396a *et seq.*) 5
25 U.S.C. 161 9
25 U.S.C. 162a 9
25 U.S.C. 611 9
25 U.S.C. 612 9

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-32) is reported at 364 F.3d 1339. The opinion of the Court of Federal Claims (CFC) (Pet. App. 33-54) is reported at 51 Fed. Cl. 60.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 2004. Petitions for rehearing were denied on August 26, 2004 (Pet. App. 56-59). The petition for a writ of certiorari was filed on November 24, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

[1] On January 7, 2005, the United States filed its own petition for a writ of certiorari, seeking review of the same court of appeals judgment that is at issue in this case. See *United States* v.

STATEMENT

1. Every Department of the Interior appropriations law since 1990 has contained a provision substantially similar to the following:

> That notwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim, including any claim in litigation pending on the date of the enactment of this Act, concerning losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss.

Act of Nov. 10, 2003, Pub. L. No. 108-108, Tit. I, 117 Stat. 1263.[2]

2. Petitioners are Indian Tribes that share an undivided interest in the Wind River Indian Reservation in Wyoming. Pet. App. 34. That undivided interest includes mineral and other resources such as oil, gas,

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Shoshone Indian Tribe of the Wind River Reservation, No. 04-929. References to "04-929 Pet." and "04-929 Pet. App." are to the petition and appendix in that case.

[2] See Act of Nov. 5, 1990, Pub. L. No. 101-512, Tit. I, 104 Stat. 1930; Act of Nov. 13, 1991, Pub. L. No. 102-154, Tit. I, 105 Stat. 1004; Act of Oct. 5, 1992, Pub. L. No. 102-381, Tit. I, 106 Stat. 1389; Act of Nov. 11, 1993, Pub. L. No. 103-138, Tit. I, 107 Stat. 1391; Act of Sept. 30, 1994, Pub. L. No. 103-332, Tit. I, 108 Stat. 2511; Act of Apr. 26, 1996, Pub. L. No. 104-134, Tit. I, 110 Stat. 1321-175; Act of Sept. 30, 1996, Pub. L. No. 104-208, Tit. I, 110 Stat. 3009-197; Act of Nov. 14, 1997, Pub. L. No. 105-83, Tit. I, 111 Stat. 1559; Act of Nov. 29, 1999, Pub. L. No. 106-113, App. C, Tit. I, 113 Stat. 1501A-153; Act of Oct. 11, 2000, Pub. L. No. 106-291, Tit. I, 114 Stat. 939; Act of Nov. 5, 2001, Pub. L. No. 107-63, Tit. I, 115 Stat. 435; Act of Feb. 20, 2003, Pub. L. No. 108-7, Div. F, Tit. I, 117 Stat. 236; Act of Nov. 10, 2003, Pub. L. No. 108-108, Tit. I, 117 Stat. 1263.

sand, and gravel located on the Reservation. See *ibid.* On October 10, 1979, the Tribes filed separate complaints in the Court of Federal Claims (CFC), alleging that the United States had breached statutory trust responsibilities by (1) mismanaging the natural resources on the Reservation, thereby failing to generate adequate revenues for the Tribes; and (2) mishandling tribal funds after collection. See *ibid.* The Tribes sought damages for all such breaches of trust occurring since August 14, 1946. See C.A. App. 69, 82; Pet. App. 5, 36.

3. The separate actions filed by the two Tribes were consolidated by the CFC. The court divided the case into four "phases," the first of which involved the Tribes' claims relating to sand and gravel resources. Pet. App. 35. The parties filed pretrial motions addressing legal issues that would affect the scope of the anticipated trial on those claims. The Tribes' petition for a writ of certiorari concerns the resolution by the CFC, and subsequently by the court of appeals, of one such issue.

In a ruling issued on November 30, 2001, the CFC addressed the impact of recent appropriations Acts (see p. 2 & note 2, *supra*) on the Tribes' ability to pursue their claims. Pet. App. 33-54. Since 1990, those Acts have provided that the applicable limitations period "shall not commence to run on any claim * * * concerning losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been furnished with an accounting of such funds." Act of Nov. 10, 2003, Pub. L. No. 108-108, Tit. I, 117 Stat. 1263. The CFC identified two disputed issues concerning the proper interpretation of those Acts: "[1] whether the Acts preserve claims time-barred before the passage of the first of [the] Acts and, if so, [2] whether the Acts

preserve only claims related to money already received by [the government] or also preserve claims for monies that should have been received by the trust but were not received because of mismanagement of the Tribes' resources." Pet. App. 38.

The CFC resolved both of those questions in the Tribes' favor. The court found that the appropriations Acts revived even moribund claims, because the Tribes had not previously received an accounting. Pet. App. 48-52. The CFC also held that "the Acts cover claims both for monies received in trust by [the government] and thereafter mismanaged and to * * * monies that should have been received by the trust but were not received because of mismanagement of the Tribes' mineral and other assets." *Id.* at 52.[3]

4. The parties subsequently entered into a settlement of the sand and gravel claims. See 04-929 Pet. App. 65a-71a. Under the terms of the settlement agreement, the United States agreed to pay the Tribes a total of $2.75 million. See *id.* at 68a. The United States reserved its right to appeal the CFC's ruling on the statute of limitations, and it agreed to pay the Tribes an additional $50,000 if the statute-of-limitations issue is finally resolved in the Tribes' favor. *Id.* at 68a-69a.[4] The CFC approved the settlement and entered

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[3] In a subsequent order (04-929 Pet. App. 55a-60a), the CFC held that the Tribes would not be entitled to prejudgment interest on any funds that ought to have been deposited in tribal trust accounts but were not so deposited. See *id.* at 56a-58a.

[4] Under the terms of the settlement agreement, the Tribes reserved their right to appeal the CFC's ruling (see note 3, *supra*) on the issue of prejudgment interest. See 04-929 Pet. App. 68a-69a. The United States agreed to pay the Tribes an additional $500,000 if the Tribes prevail on their appeal of that ruling. *Id.* at 69a.

judgment on the Tribes' sand and gravel claims. *Id.* at 61a-64a.

5. The Court of Appeals for the Federal Cicuit affirmed in part, reversed in part, and remanded. Pet. App. 1-32.

The court of appeals agreed with the CFC that the relevant appropriations Acts eliminate any statute-of-limitations barrier even to claims that were already time-barred at the time the first of those Acts was passed. The court placed primary reliance on the phrases "[n]otwithstanding any other provision of law" and "shall not commence to run," which have appeared in each of the annual appropriations Acts since 1990. Pet. App. 12-13. The court found that "[t]he introductory phrase '[n]otwithstanding any other provision of law' connotes a legislative intent to displace any other provision of law that is contrary to the Act, including 28 U.S.C. § 2501." *Id.* at 12. The court then stated that "[t]he next important phrase of the Act, 'shall not commence to run,' unambiguously delays the commencement of the limitations period until an accounting has been completed that reveals whether a loss has been suffered." *Id.* at 13.

With respect to the range of potential claims (including previously time-barred claims) that in its view the appropriations Acts have the effect of preserving, the court of appeals adopted a position between those taken by the parties. See Pet. App. 16-22. Relying on this Court's interpretation of the Indian Mineral Leasing Act of 1938 (IMLA), ch. 198, 52 Stat. 347 (25 U.S.C. 396a *et seq.*), in *United States* v. *Navajo Nation*, 537 U.S. 488 (2003), the court concluded that IMLA does not give rise to a claim under the Tucker Act based on the government's alleged failure to negotiate adequate prices for sand and gravel leases. Pet. App.

18-19. The court therefore concluded that the appropriations Acts cannot be used to delay the accrual of such a non-existent cause of action. *Id.* at 19-20.

The court further concluded, however, that even if such a claim for breach of fiduciary duty had been available, the "plain language" of the relevant appropriations Acts does not encompass "claim[s] for a breach of the fiduciary duty to obtain a maximum return from the [Tribes'] mineral assets." Pet. App. 20. The court observed that the appropriations Acts "cover[] claims concerning 'losses to . . . trust *funds*' rather than losses to mineral trust *assets*." *Ibid.* The court also explained that allowing belated claims for failure to negotiate adequate lease prices would substantially complicate Indian trust litigation because "[a]n accounting alone will not reveal the mismanagement of tribal assets; a comparison with historical market prices is required, creating a large burden on the parties and the courts." *Id.* at 21.

At the same time, the court of appeals held that *Navajo Nation* "does not foreclose liability for failing to manage or collect the *proceeds* from the approved mining contracts in violation of the trust responsibilities owed under the implementing regulations of the IMLA." Pet. App. 20. The court also believed that such claims are encompassed by the phrase "losses to or mismanagement of trust funds" in the appropriations provisions. *Id.* at 21. Accordingly, the court of appeals concluded that the relevant appropriations laws "cover[] any claims that allege the Government mismanaged funds after they were collected, as well as any claims that allege the Government failed to timely

collect amounts due and owing to the Tribes under its sand and gravel contracts." *Id.* at 21-22.[5]

DISCUSSION

The question presented in the Tribes' petition for a writ of certiorari concerns the proper interpretation of the phrase "losses to or mismanagement of trust funds," which has appeared in a series of Interior Department appropriations Acts since 1990, and which serves to define the set of claims for which the running of the applicable limitations period will be postponed pending the government's provision of an accounting. The Tribes seek review of the court of appeals' holding that the phrase does not encompass an alleged mismanagement by the government of the Tribes' *non*-monetary assets (its natural resources), including the government's alleged failure to negotiate adequate prices for sand and gravel leases. That aspect of the court of appeals' decision is correct.

In *United States* v. *Shoshone Indian Tribe of the Wind River Reservation*, No. 04-929 (filed Jan. 7, 2005), however, the government also seeks review of the court of appeals' decision. In that petition, the government asserts, *inter alia*, a different challenge to the court's

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[5] With respect to the issue of prejudgment interest (see notes 3, 4, *supra*), the court of appeals reversed the judgment of the CFC and held that the Tribes were entitled to prejudgment interest on funds that should have been brought into the trust accounts in the Treasury but that were not collected, or that were collected in an unreasonably delayed fashion, as a result of the government's mismanagement. Pet. App. 22-29. Judge Rader dissented from that portion of the court's decision. *Id.* at 30-32. The government's petition for a writ of certiorari seeks review of the court of appeals' holding on prejudgment interest, see 04-929 Pet. 23-30, as well as of the court's construction of the relevant appropriations Acts, see *id.* at 12-23.

construction of the phrase "losses to or mismanagement of trust funds." As further explained in that petition, we agree with the Tribes that this case is of great importance in the adjudication of monetary claims by Tribes and individual Indians against the United States for breach of trust. For these reasons, if the government's petition for a writ of certiorari is granted, the Tribes' petition should be granted as well, in order to ensure that the Court has before it the full range of competing interpretations of the appropriations Acts.

1. In construing the statutory language at issue here, the court of appeals rejected the government's contention that the relevant appropriations Act provisions apply only to claims that the government has dissipated or mismanaged funds that were actually contained in Indian trust accounts. At the same time, however, the court rejected the Tribes' argument that the Acts encompass *all* suits in which a plaintiff claims that more money would have reached the relevant trust accounts if the government had managed non-monetary assets (such as mineral resources) in a manner consistent with its statutory obligations concerning such assets. Rather, the court of appeals adopted an intermediate position, distinguishing between (a) allegations that the government failed to collect and deposit, in a timely fashion, monies due and owing under existing sand and gravel leases (which the court held are covered by the appropriations Acts' extension of the statute of limitations), and (b) allegations of other forms of mismanagement, such as that the government failed to negotiate adequate lease prices (which the court held are not so covered).

2. The court of appeals correctly held that the appropriations provisions do not extend the statute of limitations for claims that the government failed to

negotiate adequate prices for sand and gravel leases and similar claims of mismanagement of natural resources.

a. As the government's petition for a writ of certiorari explains (04-929 Pet. 20-23), the disputed appropriations Act language encompasses only those claims that allege dissipation or mismanagement of monies actually held in trust accounts. Various provisions of Title 25 refer to "trust funds" and require that "funds" held in trust for Tribes or individual Indians be deposited in specified accounts in the United States Treasury or invested in public debt securities. See, *e.g.*, 25 U.S.C. 161, 162a, 611, 612. Those provisions can be sensibly applied only if the term "funds" is understood, in accordance with its usual meaning, as limited to *monetary* assets. And, in ordinary parlance, a "trust fund" can sustain a "loss" only with respect to money that is first contained in the fund and then is dissipated, not with respect to money that was never deposited into the trust account in the first place but that allegedly would have been so deposited if income-generating activities with respect to natural resources like sand and gravel had been conducted in a more prudent or productive fashion. The government's reading of the appropriations Acts is further supported by principles of sovereign immunity (including the bedrock rule that waivers of sovereign immunity must be narrowly construed), as well as by the history and purposes of the appropriations provisions themselves and of the American Indian Trust Fund Management Reform Act of 1994, Pub. L. No. 103-412, 108 Stat. 4239 (1994 Act). See 04-929 Pet. 14-15, 20-23.

b. Even if the Court were to reject the government's construction of the pertinent appropriations Acts, and hold that the phrase "losses to or mis-

management of trust funds" covers some failures by the government to bring revenues into trust accounts in the first instance, the Tribes' proposed construction of the statutory language should be rejected. Questions concerning the prices that the government *ought* to have negotiated for prior sand and gravel leases lie far outside the scope of an accounting—including that required by the 1994 Act—for trust *funds*. Because such an accounting would not shed significant light on the adequacy of the lease prices previously negotiated, the purposes of the appropriations provisions would not be served by postponing the running of the statute of limitations on claims of that character. See 04-929 Pet. 21-23.

As the court of appeals explained (Pet. App. 21), moreover, acceptance of the Tribes' proposed construction of the phrase "losses to or mismanagement of trust funds" would create the potential for especially burdensome Indian trust litigation. In order to determine whether the government negotiated adequate prices for tribal sand and gravel leases, "a comparison with historical market prices is required, creating a large burden on the parties and the courts." *Ibid.* Under the Tribes' reading of the appropriations Acts, moreover, a court could be required to undertake that inquiry decades after the relevant events. Absent clear and unambiguous statutory language authorizing such untimely claims to go forward, this Court should not construe the appropriations Acts to compel that extraordinary and disruptive result.

3. For the foregoing reasons, the court of appeals was correct in rejecting the Tribes' contention that the phrase "losses to or mismanagement of trust funds" encompasses an alleged failure by the government to negotiate adequate prices for mineral leases and similar

claims of mismanagement of natural resources. In the government's own petition for a writ of certiorari, however, we have sought review of the court of appeals' construction of the same statutory language, contending that the phrase is limited to dissipation or mishandling of monies actually contained in Indian trust accounts. 04-929 Pet. 20-23; see p. 9, *supra*. Our petition also explains that the questions presented there are of great practical importance in the adjudication of monetary claims by Tribes and individual Indians alleging breaches of trust by the United States. See 04-929 Pet. 9-11. Accordingly, if the government's certiorari petition is granted, the Tribes' petition should be granted as well, in order to ensure that the Court has before it the full range of competing interpretations of the pertinent appropriations provisions.

CONCLUSION

If the petition for a writ of certiorari in *United States* v. *Shoshone Indian Tribe of the Wind River Reservation*, No. 04-929 (filed Jan. 7, 2005), is granted, the petition for certiorari in the instant case should be granted as well. If the petition in No. 04-929 is denied, the instant petition should be denied.

Respectfully submitted.

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